IN THE SUPREME COURT OF THE UNITED STATES

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TEXACO INC., :

Petitioner, :

v. : No. 04-805

FOUAD N. DAGHER, ET AL.; :

and :

SHELL OIL COMPANY, :

Petitioner, :

v. : No. 04-814

FOUAD N. DAGHER, ET AL. :

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Washington, D.C.

Tuesday, January 10, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:16 a.m.

APPEARANCES:

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Petitioners.

JEFFREY P MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioners.

JOSEPH M. ALIOTO, ESQ., San Francisco, California; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:16 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first in Texaco Inc. v. Dagher and Shell Oil v. Dagher.

Mr. Nager.

ORAL ARGUMENT OF GLEN D. NAGER

ON BEHALF OF THE PETITIONERS

MR. NAGER: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the Court of Appeals of the Ninth Circuit held that a decision to unify the prices charged for the two branded gasoline products sold by a joint venture created by Shell and Texaco could be deemed a per se violation of section 1 of the Sherman Act.

The Ninth Circuit's decision is plainly wrong. A joint venture has to be able to and is entitled to create and set the prices for the products that it sells.

JUSTICE SOUTER: Mr. Nager, on -- on that point, I have a factual question and I figured I'd get it -- excuse me -- get it out on the table at the beginning so you'd know what at least is bothering me.

The nub -- the nub of your factual argument is, as you just -- just stated it, there's a joint venture here and joint ventures price their products. The factual question that I have is this. This is -- or the preface for it is this. This is a joint venture that has continued to market, in effect, the same product that the -- that the two companies marketed beforehand, and it has done so, ostensibly, under the old brand names. Therefore, the fact that there is a joint venture doesn't necessarily disclose that there is a new product as -- as might be the case normally which you would expect the joint venture to set its own price for.

Therefore, it seems to me that if the joint venture is clearly going to cover pricing, the joint venture agreements, the documents that indicated the joint venture at the beginning, should have mentioned pricing. And yet, my understanding is that they did not do so, and in fact, the claim on the other side, as I recall the briefs, is that when the Government looked at the joint venture, prior to its going into effect, nothing was said about fixing prices -- setting prices.

So my question is, did the joint venture, as indicated by documentation, say in any -- so many words that the joint venture is going to set prices for these two -- or for the -- the -- whatever it -- whatever it sells? And -- and number two, if -- if the answer to that is no, should we regard the joint venture as covering pricing?

MR. NAGER: I believe the -- the short answer to your question is -- is yes.

JUSTICE SOUTER: There were two questions. Which?

(Laughter.)

MR. NAGER: The first question.

JUSTICE SOUTER: Okay.

MR. NAGER: I think it is undeniable -- and Mr. Minear can speak on behalf of the FTC to this. I think it is undisputed that the Government understood that this joint venture was a consolidation of both the refining assets of the two companies, as well as the marketing functions of the two companies, and that it would own the gasoline and it would decide how to sell it and what price to sell it at. I don't --

JUSTICE SOUTER: Is there a document that we could look at that -- that says that?

MR. NAGER: I don't know off the top of my head, Justice Souter, whether there's a specific document that says marketing includes pricing. But I don't think that anyone had any doubt that this included pricing. And indeed, the respondents, of course, in bringing their challenge, haven't framed this as a challenge to the ability and right of the joint venture to set its prices. What they've challenged is the subsequent decision that was made to sell the Texaco-branded Equilon gasoline and the Shell-branded Equilon gasoline at the same price.

JUSTICE KENNEDY: Well, taking that point just a bit further, your reply brief -- the reply brief for -- for Shell says that the respondent has conceded that the pricing decision to sell at the same price was not made till 8 months afterwards. I'm not sure that that's quite a fair statement. That isn't inconsistent with its suggestion that there might have been an agreement even before the joint venture to have single pricing. They just waited until 8 months to do it. So I'm not sure that your yellow brief correctly characterized their position. Tell me if I'm wrong.

MR. NAGER: Well, I -- I think that that's a -- a fair interpretation of one possible understanding of their brief, Justice Kennedy. I don't think that it matters for this Court in deciding this case whether there was discussions by the owners of the joint venture earlier than the time of September of 1998 whether they were going to unify the prices or not.

The -- the important point for this Court is that this was an efficiency-enhancing joint venture.

The Ninth Circuit didn't question that. And that in an efficiency-enhancing joint venture, it is entitled to set the prices of its product, whether it decides to do it 8 months after the venture is in operation or 2 months before, as long as what they're doing is setting the prices of the products of the venture itself.

JUSTICE BREYER: Well, it would depend. That's why -- really it's a question for Mr. Alioto, but I want to know chapter and verse citations.

Pan Am and Grace meet before they set up Panagra. Of course, they talk about price. But what do they say? Suppose what they say is you, Panagra, have the power to set price. Normal. You, Panagra, have the power to set price but never below $14 a ticket. That wouldn't be normal. What are they trying to do there? They're trying to protect Grace.

So I think a lot would depend on what they said in the preliminary meeting, and of course, what I want to know is this is a summary judgment motion where, as the other side pointed to particular conversations that they made which would say it's more like the second than the first.

MR. NAGER: Well, what I can say to that, Justice Breyer, is our opponents have repeatedly pointed out in their briefs deposition testimony that the parties refused to discuss price with each other before they had an actual memorandum of understanding out of concerns about the antitrust laws.

JUSTICE BREYER: It may be, but still at some point they discussed it and I would like to know what they said.

MR. NAGER: Well, I'll have to leave that for the respondents to address for you.

But what -- what the court below pointed to was conversations that took place in the spring of 1998 about a strategic marketing initiative. And this is after the formation of Equilon, after Equilon was operational. And at that point, all you conceivably have at that point with the owners of Equilon having left the market is Equilon subject to the direction of its owners setting the prices for its products, and it could sell them as Shell gasoline, it could sell them as Texaco gasoline, it could choose to sell them as something else.

JUSTICE GINSBURG: Then what did it mean -- I think you said it in your brief that both brands were sold exclusively by Equilon after the joint venture created -- was created. Each venturer maintains its own marketing strategy. What was the marketing strategy that each venturer, Shell and Texaco, separately maintained?

MR. NAGER: I'm not sure what the reference is, Justice Ginsburg. Once the joint venture existed, Equilon had its own marketing strategy, and Motiva, the other joint venturer, had its own marketing strategy. The -- the role of the owners at that point was on a members committee, which -- as a typical board of directors where the -- each CEO of each joint venture had to present a business plan and obtain approval by the owners of the -- of the joint ventures for the upcoming year.

JUSTICE KENNEDY: Were the parties indifferent as to how much of each brand was sold? Texaco didn't care if Shell got 90 percent of the sales? It just didn't care?

MR. NAGER: Well, I don't think we could say they didn't care because there were, as part of the joint venture agreement, brand management protocols to preserve the equality of the brands. But that was the only limitation, and that's a limitation that could be challenged. Don't misunderstand our position in this case. That was part of the agreement to create the joint venture. That is subject to section 1 of the Sherman Act, but it's challengeable on a rule of reason inquiry because this is an efficiency-enhancing joint venture.

JUSTICE KENNEDY: But -- but if they cared, doesn't that show that there was still an element of competition, but the competition is suppressed if the price is the same?

MR. NAGER: Not in -- not for -- with regard to Equilon because why they care, Justice Kennedy, is that -- that they licensed these brand names to the joint ventures and they maintained control of the asset that they licensed, their name, because they operated in other markets where they weren't in competition with Equilon and Motiva. They did do business in other countries around the world, selling branded gasoline, unbranded gasoline, and other petroleum products. But as with any licensor, they care that the -- that the good will that they're licensing is not impaired. So like any licensor, they put restrictions on the ability of -- of the joint ventures to disparage those names or to undermine those names.

But the decisions as to how to market and what to sell and at what price to sell was the single entity Equilon in the western United States, and that's why it's not covered by section 1, much less subject to per se analysis.

JUSTICE KENNEDY: One more question and then

-- how was it decided how much raw gas would be delivered to the venture by the two parties?

MR. NAGER: That was a decision made by Equilon. Equilon would purchase petroleum on the open market. It could purchase it from Shell. It could purchase it from Texaco. It could purchase it from British Petroleum. And it -- the -- the petroleum products are bought on the open market in arm's length transactions, sent to the refineries, and then the managers of Equilon or Motiva would make the decision as to which petroleum products to make out of that crude.

What's important to remember here is that Sherman Act doesn't apply to any agreement. Under this Court's decision in Copperweld, it applies to decisions between independent actors, that section 1 applies to concerted activity, not to unilateral activity, so that in Copperweld, a parent could not enter into a conspiracy with its wholly owned subsidiary. In Copperweld, the Court -- the Court points out that the officers of a company may enter into agreements with each other, but they don't enter into agreements covered by section 1. They're agreements within a single entity.

And what we have here is the same thing that the Court was talking about in Copperweld in getting to its decision in Copperweld, is you have a agreement of Shell and Texaco, which is plainly subject to section 1, to create this joint venture and can be challenged on a rule of reason analysis. But once they have that agreement, you now have the directors of a single entity determining what the prices of its products will be, and that is not subject to further section 1 --

JUSTICE SCALIA: Well, do you acknowledge that the rule of reason analysis of the -- of the initial formation can include a rule of reason analysis of whether it -- it would violate the -- the Sherman Act to -- to have the new entity price both products the same?

MR. NAGER: Yes, Justice Scalia, but I don't think that anyone would ever do that in a rule of reason section 1 analysis. What they'd look at in a rule of reason section 1 analysis is whether the combined entity would have the sufficient market power to engage in supracompetitive pricing. This Court has repeatedly said in section 1 cases it doesn't ask whether the specific price set is a reasonable price --

JUSTICE BREYER: I mean, that's a surprising concession to me. We -- we found a -- a joint marketing company. All right? And the whole point of this is to set single prices. And you're saying when they -- and the venture, let's say, is approved by the FTC, the joint selling agency. The purpose of it is to set a single price to sell in France or something.

MR. NAGER: Correct.

JUSTICE BREYER: And you're saying now we're going to go look at their prices that they set and decide if they're reasonable?

MR. NAGER: Well, what I -- what I tried to say, Justice Breyer -- maybe I should change my answer to no. What I tried to say is -- is that the facts at the -- at -- that are involved in the creation of the joint venture -- all of them can be considered as part of a rule of reason analysis.

But what I tried to go on to say to Justice Scalia was no one doing that rule of reason analysis would care about what the specific price is. That isn't what they would look at. What --

JUSTICE SCALIA: You could say you -- you just never get beyond step one. You don't go any further if there's no market power.

MR. NAGER: That's correct. And in this --

JUSTICE BREYER: Maybe there is.

MR. NAGER: In this particular case, the respondents made a conscious litigation choice in the district court to waive a rule of reason claim. And this case proceeded in the court of appeals with the rule of reason challenge to the creation of the joint venture as waived. The court below didn't question that at all. It accepted it. It accepted that there had been a waiver of a rule of reason challenge, that this efficiency-enhancing joint venture had substantial economic justifications, and what it -- and the only -- the only rule of reason challenge that could have been brought then was waived by these parties. Another case. That's not this case. Another case, a rule of reason inquiry could be brought.

JUSTICE SOUTER: Mr. Nager, what if you had a -- a crazy kind of joint venture -- or maybe it wouldn't be so crazy -- in which it was just like this one? The two companies said we're going to form a joint venture to market these products. You know, we'll use one fleet of trucks and -- and we'll have one computer to determine who needs gas and so on. But each company -- each of the -- the principals forming the venture retained the -- the power to determine the price of the gasoline that is sold under their brand. And then 6 months later, the two companies get together and they decide to fix the price. That decision would be subject either to quick look or per se analysis, wouldn't it?

MR. NAGER: I think the answer to your question depends upon facts that you haven't stated. If the original joint venture is a sham for a horizontal arrangement --

JUSTICE SOUTER: Well, I'm assuming there -- there are, indeed, efficiencies to be attained by it so that it's not a sham. They just retained -- they said, look, we're -- we're still using our old brands, ostensibly, in the market and we're retaining the power to set the price individually with respect to the gas that is sold under those brands. So no sham.

MR. NAGER: Well, I'm not sure at that point that they've entered into an agreement to share the risks and loss -- of profit and loss from the assets that they're putting together. I mean, this Court's decision in Maricopa County says that that's the critical test.

JUSTICE SOUTER: Well, are you -- are you saying in practical terms that my hypothesis is -- is just a practical impossibility?

MR. NAGER: Well, I -- I can't say that because you get to ask the questions.

JUSTICE SOUTER: No, no, but -- no.

(Laughter.)

JUSTICE SOUTER: Beyond -- be candid. I won't get mad.

(Laughter.)

JUSTICE SOUTER: Is -- is that -- is that really your -- your point that I've come up with a hypothetical which is just a non-real-world hypothetical?

MR. NAGER: It's a big country, and there are a lot of things that happen out there and so I can't assume that I want you going back to chambers thinking that it can't happen. I want to answer it even if it can happen --

JUSTICE SOUTER: Okay. Assuming it can happen, in -- in that case, would the subsequent agreement as to price be subject to per se or a quick look analysis?

MR. NAGER: I don't think so. It's like a law firm. It's like my law firm. When I join together with my partners, we may agree in our partnership agreement that each partner is going to have some control over what their billing rate is. As long as we have thrown our lot in together and as long as we're sharing the risks and loss of that activity -- that may be a stupid thing --

JUSTICE SOUTER: Yes, but there's -- there's one part of the lot that you haven't thrown in together, and that's the pricing lot. In -- in my example, your -- your law firm agreement would be each partner can decide exactly what he wants to charge. If -- if one wants to charge $10,000 an hour and another wants to charge $15 an hour, his choice.

MR. NAGER: Well, again, I don't think -- it's hard for me to see very many business persons getting together and entering into such an arrangement.

JUSTICE SOUTER: I -- I agree.

MR. NAGER: But as long as --

JUSTICE SOUTER: You said we're going to do it on the hypothesis that it's a big country and somewhere out there somebody might do this. If -- if two oil companies did it, quick -- quick look or per se analysis?

MR. NAGER: I -- I think the answer is -- is that if the -- if the -- the joint venture itself was an efficiency-creating joint venture that can survive rule of reason scrutiny, that business has the right to conduct itself subject to the restrictions that were put in the original agreement. That agreement to reserve the power to the parents would be subject to challenge as part of a rule of reason analysis whether they entered into an agreement later or not, but the challenge goes to the terms upon which the venture is created, not to the operational activities of the venture.

Mr. Chief Justice, if I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Nager.

Mr. Minear, we'll hear from you.

ORAL ARGUMENT OF JEFFREY P. MINEAR
ON BEHALF OF THE UNITED STATES,
AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

MR. MINEAR: Mr. Chief Justice, and may it please the Court:

The court of appeals erred in this case in -- in its ruling that a alleged agreement between two noncompeting owners of a joint venture respecting price is a per se violation of the Sherman Act.

And this is not a per se violation for two particular reasons. First, the venture in this case is not a sham, but rather a lawful efficiency-enhancing integration of economic activity. And second, the parties in this case do not compete with one another or the joint venture in the selling of the product.

CHIEF JUSTICE ROBERTS: Respondents don't concede that the joint venture is lawful, though.

MR. MINEAR: As this case comes to this

Court, that's a necessary conclusion of the court of appeals determination. In the district court, the parties -- the respondents had argued that this was a patently anticompetitive joint venture, and the district court rejected that, and it said at page 68 of the Texaco petition appendix that no reasonable jury could find that this joint venture is patently anticompetitive. And it further found that respondents did not make a rule of reason challenge to the legitimacy of the joint venture.

So as the case came to the court of appeals, it came to it with that ruling, and the court of appeals itself at pages 4a and 5a of the petition appendix --

CHIEF JUSTICE ROBERTS: Well, in the Citizens Publishing case, it wasn't a necessary predicate of the Court's ruling there to find that the joint venture was unlawful, was it?

MR. MINEAR: No, it wasn't, but we don't think that Citizens Publishing has a direct bearing on the case here. This Court's reasoning with regard to per se analysis and joint ventures have evolved beyond the simple statement that was made in Citizens Publishing. Instead, the Court looks to the question of whether or not the agreement at issue is plainly anticompetitive.

And as this Court's decisions in cases such as BMI and NCAA have recognized, the -- simply attaching the moniker of price fixing or pricing implication is not sufficient to answer the question, the fundamental question here, which is is there actually a fixing of prices between two parties that are in competition. That's not the case here.

The pricing implication agreement that's alleged in this case is -- arises out of a joint venture in which, by the very nature of the joint venture itself, the two participants no longer compete, and in the absence of such competition, this is much like a merger. And in the same way that if the two parties had merged their downstream operations, they would be able to choose whatever prices that they chose.

Likewise, the same applies with regard to the joint venture, and it's particularly true that this cannot be subject to a per se analysis.

CHIEF JUSTICE ROBERTS: Well, the two parties obviously don't compete within the terms of the joint venture, but they compete more generally.

MR. MINEAR: That's correct. And with regard to --

CHIEF JUSTICE ROBERTS: And you couldn't have two companies say we're not going to -- we're going to have a joint venture on this corner, but in -- you know, down the block, we're going to compete, and then it's all right to set prices on this corner but not down the block.

MR. MINEAR: That's correct. And so an agreement outside the joint venture to take -- to enter into anticompetitive activity outside the joint venture is subject to further analysis.

JUSTICE SOUTER: But didn't we have competition even within the joint venture for a few months? Because -- correct me if I'm wrong on the facts. I thought for a few months the -- the price differential was maintained. I think there was a 2 cent price differential or something like that. And so long as that was maintained, weren't they competing?

MR. MINEAR: No, Your Honor. The -- the decision, once the joint venture took effect, as to how the products would be priced, was simply an allocation of the profits of the joint venture. There's no actual competition between Texaco and Shell. That was simply the formula for determining --

JUSTICE SOUTER: Wasn't there competition in -- in the -- in the retail market? I mean, if I had two stations in front of me and one was selling gas 2 cents cheaper, I'd -- I'd go to the one that was 2 cents lower. Isn't that competition?

MR. MINEAR: Yes, Your Honor. But in -- in that regard, there's competition at the pump, but there's no competition -- as between those two gas stations, but there's no competition between the owners of the joint venture here, Texaco and Shell.

JUSTICE SOUTER: Because that differential was not reflected in what their agreement provided that each could respectively take out of the joint venture.

MR. MINEAR: That's exactly right.

JUSTICE BREYER: That's exactly right. I would have thought there's no competition because there are not two independent decision-makers.

MR. MINEAR: That's correct.

JUSTICE BREYER: It has nothing to do with the prices that end up.

MR. MINEAR: And in fact --

JUSTICE BREYER: Maybe you could explain to me how this did work. The -- the -- my understanding, which might be not correct, is we have some facilities that refine gasoline and there are some people who take the gasoline that is refined and they sell it to gas stations. Now, those facilities and those people now work for one hierarchy of officials called Equilon. Is that right?

MR. MINEAR: That is all correct.

JUSTICE BREYER: All right. So somebody has to say what price it's being sold at. Equilon's gas. Who decides it?

MR. MINEAR: Well, that's the factual dispute that the court of appeals recognized in this case.

JUSTICE BREYER: All right. What is it?

MR. MINEAR: Texaco and Shell take the position that simply this is a decision that's made by the owners of Equilon or Equilon itself --

JUSTICE BREYER: No. I imagine there are some human beings in Equilon called marketers, and those human beings in Equilon who work for Equilon would say Equilon will sell the refined gasoline to gas stations at such-and-such prices. That's normally how a company works. Is there something different about this?

MR. MINEAR: No, there isn't. And in fact, that is why this cannot be analyzed under the per se rule. This is simply a situation in which a single company is selecting the prices of its -- of its --

JUSTICE BREYER: What is their view of it?

MR. MINEAR: Respondents' view is that there was an agreement that was entered into, an alleged agreement, at the time of formation of this entity, in which Texaco and Shell agreed to set the Texaco product and the Shell product at the same price. And the United States' response to that is that cannot be a per se violation of the antitrust laws. That is simply -- there -- because the parties are not competing with one another, it doesn't make any difference whether or not they've agreed to set it as the same price or different prices. It simply is irrelevant to the anticompetitive --

JUSTICE BREYER: The Texaco product being a product that comes out of refineries that previously belonged to Texaco or the Texaco product being gasoline that comes out of either refinery but is sold to stations labeled Texaco, or both? Which?

MR. MINEAR: It is more the latter, Your Honor, that what happens in these cases the refineries refine unbranded gasoline. They send it to distribution centers, the terminals, and at that point additives are added and the gasoline then is sold as either Texaco or Shell gasoline.

JUSTICE BREYER: All right. I could see how that could be a violation because it's possible that Equilon, if left on its own, would decide that its best marketing strategy was sometimes to set a differential. But now they can't do that because the two parents have agreed that they can't.

MR. MINEAR: But that is simply the choice that the owners --

JUSTICE BREYER: Is that what happened?

MR. MINEAR: That is -- would be the same as if the owners or the shareholders made a decision about how two different products --

JUSTICE BREYER: That would be rather like Pan American and Grace saying that, Panagra, charge whatever price you want, but above all, don't go below $50 because remember, we, Grace, have some ships out there and we want people to take the ships.

MR. MINEAR: Well, Your Honor, in that situation there could be an antitrust violation, but it would not be a per se violation. It would be a rule of reason violation.

And as this case comes to this Court, the question is whether is there -- there was a per se violation of the antitrust laws, and we cannot say that this agreement, if it exists, was so plainly anticompetitive that it can be condemned without a further inquiry into the nature of the relationship here.

I'd like to point out also the court of appeals erred further by trying to limit the effects of its per se ruling by invoking the ancillary restraints doctrine. The ancillary restraints doctrine does not apply here. It applies to a situation that Justice Souter referred to earlier where if the two parties entered into a joint venture and then the owners of the joint venture agreed to some agreement outside of the joint venture -- for instance, to -- to set the price of their products outside the joint venture -- in that situation, under the ancillary restraints doctrine, the question would be is that particular agreement reasonably necessary for -- to fulfill the purposes of the joint venture.

But that's not what we have here. The agreement here goes to the conduct of the venture itself, and even under a rule of reason analysis, the inquiry would be, first, what is the nature of the agreement. Does it have anticompetitive effects? And are those anticompetitive effects outweighed by other procompetitive benefits? That is the type of analysis that would be made in this case if a rule of reason analysis was invoked by respondents. They have not done that in this case, and the same rule -- the same reasoning applies with respect to the quick look doctrine.

In both of those cases, there simply is not a basis for finding a antitrust violation, and this Court should reverse the finding of the -- the judgment of the court of appeals and reinstate the judgment of the district court granting summary judgment to petitioners.

This case --

JUSTICE KENNEDY: Mr. Minear, you indicated that in the first 8 months, when there was differential pricing, you said that was the way to allocate profits. I thought they shared the profits on some other basis.

MR. MINEAR: If I said that, I misspoke. The profits were shared based on a ratio of the contributions of -- of assets that were devoted to the joint venture. What I meant to say, rather, was it could have been more like a performance-based pricing mechanism, but it does -- it had no bearing on the -- the relative profits that either firm would make. It was simply a pricing decision.

Equilon had to price its products at some price, and so initially it set it at some -- whatever prices they may have been. But ultimately the pricing decision is -- simply does not have anticompetitive significance here.

I would like to emphasize this case -- thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Minear.

Mr. Alioto.

ORAL ARGUMENT OF JOSEPH M. ALIOTO

ON BEHALF OF THE RESPONDENTS

MR. ALIOTO: Mr. Chief Justice, and may it please the Court:

Justice Souter, in answer to your question whether or not they advised that they were going to fix the prices when they formed the venture, the answer is no.

In answer to your question whether or not they had any document advising the Government that they intended to fix the prices, the answer is no.

JUSTICE SCALIA: I don't -- I don't really -- who -- who would set the price if it was not -- if it was not the joint venture?

MR. ALIOTO: Shell and Texaco fixed the price, if it please -- if it please Your Honor. Under the brand management --

JUSTICE SCALIA: The joint venture owns the gasoline. Okay? And it owns the gas stations, those that aren't independent stations. And somebody else is going to set the price for the gas that the joint venture owns? Wouldn't you need some separate agreement that clearly sets that forth?

MR. ALIOTO: Yes, Your Honor, and at page 5 of our brief, we pointed that out. There were two parts to it. Under the agreement -- and if you'll look at page 5 of our brief, we have both of the agreements. And under those agreements -- under those agreements, it was necessary that the -- I'm sorry. At page 7. Under those agreements, if the Court will look at it, first of all, it says, the company's business shall be conducted by the CEO and other officers of the company, subject to the direction by, and in accordance with the policies, business plans, and budgets approved by Shell and Texaco -- they said the members -- acting by and through the members committee. That's Shell and Texaco. But more importantly --

JUSTICE SCALIA: It's the board of directors. Isn't it? Isn't the members committee the board of directors of -- of the joint venture?

MR. ALIOTO: If the board of directors are Shell and Texaco and if they are the ones who are -- the next statement, Your Honor -- the -- they -- they must -- the company must follow the policies, strategies, and standards established by the members committee. The members committee is Shell and Texaco and Saudi.

JUSTICE SCALIA: That's because it's a joint venture.

MR. ALIOTO: A joint --

JUSTICE SCALIA: That's the nature of a joint venture. The board of directors is composed of people representing the various elements of the joint venture.

MR. ALIOTO: The pricing didn't --

JUSTICE SCALIA: There's nothing subversive about that.

MR. ALIOTO: The pricing didn't have anything to do with -- if it please the Court, the pricing didn't anything to do with the joint venture. On page 12 --

JUSTICE SOUTER: No, but isn't -- isn't it expectable? I mean -- and this is -- I think this is Justice Scalia's -- isn't it -- isn't it expectable that if you don't have an agreement that clearly says the two -- the two joint venturers, respectively, retain the right to -- to price products sold to the consumer under their brand name, that in fact it is the joint venture that will price the products?

MR. ALIOTO: No, Your Honor.

JUSTICE SOUTER: And therefore, it is a

decision of the joint venture, not of the -- the two original principals.

MR. ALIOTO: No, Your Honor, for a couple of reasons.

First of all, in Citizens Publishing, that did not exist. This Court did not abolish the joint venture there. What it did was it cut out the price-fixing part of it only. Just as the lower court said, the joint venture there does not depend upon --

JUSTICE GINSBURG: Citizens -- Citizens Publishing did not have a joint venture that had advance approval from the FTC. It had --

MR. ALIOTO: Correct, Your Honor.

JUSTICE GINSBURG: And I think that makes a big difference. I mean, the FTC blessed this and said it was okay. They asked for certain adjustments. Those were made. One of them was not, that you had to maintain a differential in the price between Texaco and Shell.

MR. ALIOTO: If it please Your Honor, there are many times in which this Court has said that the FTC does not have the authority or power to grant immunity from antitrust violations. In --

JUSTICE GINSBURG: But the FTC, which is the expert agency, said we don't think this joint venture is an antitrust violation. Don't we owe some respect to that determination, which was absent in Citizens Publishing?

MR. ALIOTO: Yes, Your Honor, but I believe also that you should give some respect, too, to this Court's prior orders and this Court's prior decisions. In Citizens Publishing, the Court left alone the joint venture, and it separated out the pricing and took it out and cut it out.

JUSTICE SCALIA: Yes, but that's because the joint venture did not include -- did not include a merging of the product as it did here. Here, the gasoline from both of them was merged into one gasoline, which was sold and the profit of which was divided between them. In -- in Citizens Publishing, each of the newspapers continued to sell its own newspaper and to -- and to reap whatever profit it could make from its own newspaper. That's fundamentally different from here. There -- there still is competition between the two newspapers.

MR. ALIOTO: In all due respect, Justice Scalia, they did not join the gasoline. The gasoline was separate and apart. They -- that was very important. They maintained them separate and apart. They competed separately for at least 8 months.

JUSTICE SOUTER: No, but Mr. Minear --

CHIEF JUSTICE ROBERTS: So if they had combined and if they had agreed in the joint venture to sell a new brand of gasoline, Equilon gasoline, of course, they would -- the joint venture would be free to set the price of that.

MR. ALIOTO: I believe that that's probably correct, Mr. Chief Justice. However, it is not the kind of thing that this Court talked about in BMI and the other cases.

CHIEF JUSTICE ROBERTS: So if it's correct -- if -- if that's correct, what is the difference if the joint venture decides that it's going -- they're going to make more money having two separate brands and even though it's Equilon gas, the people are going to think it's different because some people have always bought from Texaco and others from Shell? It's not going to affect how the profits are distributed. It's still going to be the same whether it's Equilon gas or Texaco and Shell. Why does the joint venture lose the authority to set the price of its product?

MR. ALIOTO: The reason it loses the authority, Your Honor, is that there has to be some kind of reasonably necessary means so they -- it has to be reasonably necessary that they need to price the products in order to make the joint venture work. On page 12, we gave you the testimony where the chief executive officer of Texaco and others specifically said that the -- that the pricing had nothing to do with the cost savings or the --

JUSTICE BREYER: Yes, that's right.

JUSTICE SOUTER: Well, that's true, but Mr. Minear had a response to that, it seems to me, a kind of blanket response, and he said that's only relevant unless you are dealing with pricing decisions between competitors. And the one thing, if I understood him correctly, that is clear is that under the undisputed portions of the joint venture agreement, the price at which the products were sold, high, low, differential, no differential, did not affect the distribution of profits as between the two joint venturers. Therefore, they were not competing with respect to the pricing, and therefore, the -- your -- in effect, your whole argument collapses because you don't have, on any analysis, an agreement between two competitors.

MR. ALIOTO: But, Justice Souter, Citizens Publishing -- they did exactly the same thing. They pooled their profits under a -- under a formula that was very similar to the formula here.

JUSTICE SCALIA: But they were competitors.

They were -- each one of them sold its own newspaper. All they merged was -- was their publishing facilities. And when they agreed separately not to -- to charge the same price for the newspaper, that was not part of the joint venture. That was, indeed, an agreement between competitors. There were two separate newspapers selling on the basis of their own distribution system and so forth.

MR. ALIOTO: And the same existed here, Justice Scalia. Shell and Texaco were -- operated basically independently for at least 8 months, and certainly before they were major competitors.

But look what happened here. All of the costs that were -- all of the cost savings in this situation -- there are -- to show how -- to show the anticompetitive effects of what happened, in this case, the crude oil was down to its lowest since the Depression. The costs were being reduced under the so-called joint venture substantially. Plus, there was excess supply.

JUSTICE BREYER: Let me go back for a second. I'm just trying to get it clear.

My -- my belief -- I've always thought that Citizens Publishing was a case where the district court said that the formation of the joint operating venture

-- the basic formation, which involved a stock acquisition -- violated section 7. And then they created a decree. And the question was -- for the Supreme Court was whether the district court was right in holding there was a section 7 violation. Now -- now, maybe I'm wrong on that. I'll go back and look at it.

MR. ALIOTO: Yes, Justice Breyer.

JUSTICE BREYER: If so, if I'm right on it, then what we're lacking from your point of view here is a claim that this whole joint venture is unlawful. And I agree with you. If you make that claim, I don't think the FTC can insulate it, I guess, unless there's something I don't know about, but you're not making the claim anyway.

So here, unlike Citizens Publishing, we're -- we have to deal with this on the assumption that the joint venture is lawful.

MR. ALIOTO: Even --

JUSTICE BREYER: I don't see how to get out of that, but maybe you can tell me I can. But wait.

Now, what I'm trying to get at is what precisely is your claim, given the lawfulness of the joint venture?

One part I see. One part I see is that the people who are setting the prices are the board of directors of a venture company who represent Shell and Texaco. Now, that might run up against Justice Scalia's objection.

But I want to sure -- sure I have all of them. That is, I want to know if there's some other claim you're making here in respect to an agreement between Shell and Texaco as to Equilon's prices. And if so, what is it and where is the reference in the record?

MR. ALIOTO: Taking each of the questions that you asked, Justice Breyer, first, Citizens Publishing was section 1 and 2 and subsequently --

JUSTICE BREYER: 7.

MR. ALIOTO: -- section 7. Okay.

Second, in Citizens Publishing, the lawfulness of the joint venture, like here, even if you posit that the joint venture is lawful, it -- the pricing must be -- must be necessary in order to achieve those -- those savings in order to be justified.

When there's no connection, it's just a straight, naked restraint, and even if it were -- even if the joint venture were lawful here, even if that were so and they had all these cost savings, in the face of all of those lowered costs and the lowest crude oil and the excess supply, they not only took the price leader and the price cutter, they brought them to the same level, and then they increased the price another 67 percent in major markets --

CHIEF JUSTICE ROBERTS: I concede that it would have been perfectly legal for them to do that if they called all of their gasoline Equilon gasoline because they owned all the gas and the profits are going to be distributed to the owner the same way whether they call them Texaco or Shell. Why is it suddenly different because they put different labels on the -- keep different labels on the gasoline?

MR. ALIOTO: They want to maintain, first of all, their independent identity just like Citizens Publishing. They want to maintain that. They had a standstill agreement you can't merge these. They didn't want to join them. They didn't want to make a new product. They didn't want to do that. All they wanted to do was fix the price of gasoline in the United States.

JUSTICE BREYER: That -- that might be. But I don't want you to forget the last part of my question, which for me was the most important, because I can read Citizens Publishing, but it's going to be tough for me to find in the record any claims that you make that the two companies have agreed as to price, like the Panagra example. That's why I gave it, to put it in your mind. So if there's anything like this that you're claiming, I'd like to know, or is your total claim that the activity of Shell and Texaco in setting the price of Equilon is to have their representatives on the Equilon board of directors tell Equilon what price to sell? Or is there something else? I just need to know. Is it just that, or is there something else in this case?

MR. ALIOTO: There is more. What the -- Okay. What they did is when -- is when the members decided that they wanted a new plan -- this is after 6 months that they had been operating their joint venture without fixing the price. They then had a program that they submitted that they required Equilon and Motiva to follow. And this was their so-called strategic price plan.

JUSTICE BREYER: Was it the board of directors that did that, or was it something else?

MR. ALIOTO: If -- if you want to say that the members committee are the board of directors, Justice Breyer, okay. But in fact and in truth, it is the -- it is Shell and Texaco, independently without any conversation with the representatives of Equilon, who are doing this. What differences this from -- from Northern Securities and -- and any of the other cases in which the board of directors, so-called, were the former major competitors -- what difference what form they take -- and they --

JUSTICE SOUTER: I can understand your argument if we were doing a rule of reason analysis. Is that something that can properly be analyzed on quick look or per se?

MR. ALIOTO: Absolutely, Your Honor, because first of all -- first of all, with regard to Citizens Publishing, it is per se.

Secondly, with regard to quick look, look what you have. First you analyze the -- as we've said -- as you've said before in your decisions, first you analyze the restraint. What is it? It's a restraint directly on price. It's not covered up any way. It's not something doing something like less supply to fix the price. It's directly at the price.

The second thing is, in doing that, is this restraint necessary, not less -- not much -- essential -- is it necessary to -- to get the -- what you're saving on the joint venture? Is it necessary to promote the objectives of the joint venture?

JUSTICE GINSBURG: May I ask a very naive question? Is -- this is basically the same commodity, gasoline. They have different attitude -- additives, but basically costs the same. Facilities to produce it are the same. Why should they -- should there be from -- now that they're marketing this under one joint venture, why should they make a difference in the price of what is basically the same commodity?

MR. ALIOTO: There are two answers to that, Justice Ginsburg. First of all, they are not the same commodity because they said -- they were asked and they said it was different. They maintain the difference. They seem to think that it's different.

Secondly --

JUSTICE GINSBURG: Well, what difference physically is there other than they have different additive -- additives?

MR. ALIOTO: That's what they say, Your Honor.

Secondly, if Equilon were given the right to do its own pricing, if they had given all of that right to them, and that they weren't the real puppeteers, as it were, that would -- might be a different situation.

JUSTICE BREYER: Well, but that -- that sounds like the complaint that you're making. We have a problem, say, with -- with the newspapers or whatever it is. It's awfully dicey as to whether they should form this joint venture. It's going to eliminate a lot of competition.

But now what you're saying is, look, at the very least, they should structure it in a way that the independent pricing decision is made by Equilon. Don't structure the pricing decision so that bit by bit, day by day it's made out by six people, half of whom represent Shell, half of whom represent Texaco. I can see that as an argument. This is more restrictive than necessary.

MR. ALIOTO: Of course.

JUSTICE BREYER: Now, you get me that far, and now I -- I -- but I say why isn't that a rule of reason because you're really fighting the structure of the venture they come up with.

MR. ALIOTO: They come -- then, if it please Your Honor, that after I pointed out that the restraint is directly on price, which should be a red flag to anyone, and also that I pointed out that there is no reasonable relationship between the pricing and the cost, the savings, for the joint venture, the last issue on that is whether there's any justification. And what justification is there? There's none.

JUSTICE KENNEDY: But I don't -- I don't understand, Mr. Alioto, if the profits are -- are not traceable to how much of -- of the two products are sold, if the profits aren't divided that way, why should the two lines be continued to be marketed independently? There's no other analog I can think of in -- in the business world for that. There -- there's no motive to make one any cheaper than the other once the profits are shared evenly, and that's the structure of the venture.

MR. ALIOTO: Justice Souter -- I believe a number of answers to that, Justice Kennedy.

First of all, this is so temporary. They've done this for -- they have the right to get out of this in 5 years. They're already out of it. It doesn't exist anymore. They could do it mutually in 5 years. They could do it by themselves after 5. They haven't done it anywhere else in the world. All they're doing is getting together and being able to fix the price. So it's so temporary. What difference does -- really does that make?

But, in addition, it's the profit pooling that was also illegal, declared to be illegal by this Court in its 7 to 1 decision in Citizens.

JUSTICE SCALIA: Of course --

MR. ALIOTO: The Court didn't like that either.

JUSTICE SCALIA: -- they're not able to fix the price unless they have market dominance. I mean, do you think they're just competing with each other? Aren't there other companies selling gasoline?

MR. ALIOTO: In all due -- in all --

JUSTICE SCALIA: And I don't think that this -- this joint venture would have been allowed if -- if these two companies together dominated the market. Of course, it wouldn't have been allowed.

MR. ALIOTO: In all due respect, Justice Scalia, the -- you do not have to have market power to fix prices. That's not a criteria. That is certainly not a predicate. Anybody can fix prices. You fix prices. It's illegal per se. That's the point. And --

JUSTICE SCALIA: You mean fix prices successfully.

MR. ALIOTO: They did it.

(Laughter.)

JUSTICE SCALIA: Fix -- fix prices and not be an idiot at the same time.

(Laughter.)

MR. ALIOTO: It wasn't silly for them to, first of all, change the differential that lasted for years, and it wasn't silly for them to increase the price by 70 percent as soon as they made the agreement. There was nothing silly about that. Many people suffered because of it.

JUSTICE GINSBURG: One of the briefs said that the reason for that price hike was that there was an explosion in a refinery in California and outages in others and that there was a market-wide price increase. That was in --

MR. ALIOTO: Yes, Justice Ginsburg. If -- if -- in the face of the facts that we have in the record -- and that's not a -- I don't know that that's a fact. Let them present it to a jury if they say that that's the reason.

When they have a situation where the crude oil is as low as it's ever been since the Depression, when they say they've saved $850 million on their joint venture, and when they say there's excess capacity, even -- you don't need to be Adam Smith to know that the prices are supposed to go down. And what happened instead? They went up and they went up dramatically.

JUSTICE SCALIA: You don't -- you don't want them to present it to a jury, as I understand it.

MR. ALIOTO: Pardon me? Pardon me, Justice?

JUSTICE SCALIA: You don't want them to present it to a jury. The whole reason that you're here is that you want us to declare a per se violation. You -- you want to put it to a jury?

MR. ALIOTO: Per se -- per se violations are put to juries all the time, Justice Scalia. The question is you have to prove that that's what they did.

I agree with the Court in this way. I agree. I don't think it -- I don't think it should go to trial. I think this Court should do as it did in Citizens Publishing and make it very plain to everybody that you're not going to allow them to use a joint venture as a cover, even though it is legal --

JUSTICE STEVENS: But, Mr. Alioto --

MR. ALIOTO: -- to go do something unlawful.

JUSTICE STEVENS: -- Mr. Alioto --

MR. ALIOTO: Yes, Justice Stevens.

JUSTICE STEVENS: -- is it not correct that in the Citizens Publishing case the agreement itself was invalid?

MR. ALIOTO: The -- the joint venture was not declared invalid, Justice. The joint venture was preserved. They were allowed to continue to keep the presses together, to keep the trucks together, to -- to use the joint venture. As the court said below and as this Court said, the -- the pricing didn't depend -- depend -- I mean, the joint venture didn't dependent upon the pricing.

JUSTICE STEVENS: Why did they get into the discussion of the failing company doctrine in the case?

MR. ALIOTO: They've used the failing company doctrine, Your Honor, both in Northern Securities and in Citizens Publishing, and that was the -- that was the reason what -- which they gave initially to join, and that was an issue. And Justice Harlan said, okay, that was an issue. He thought that that should be tried.

But that was not pertinent to the question of whether or not the pricing, if it is so divorced -- I -- I must bring -- bring the Court back to this statement by the chief executive officer. He said that the cost savings and all the synergies, the pricing had nothing to do with it. Nothing he said. So if it had nothing to do with it, then what are they doing fixing the price?

JUSTICE STEVENS: No, but if the Government and everybody agrees that the joint venture is perfectly lawful, I'm still not quite sure your answer to the Chief Justice's question. If they can fix the price of a single brand, why can't they fix the price of -- of two brands at the same time?

MR. ALIOTO: Let me say it in this way, Your Honor. I don't think that Shell and Texaco, if they got together and they say, look it, we'll get rid of both of our gasolines, let's just have one gasoline, and they fixed the price, I think that that would be illegal.

JUSTICE STEVENS: Well, of course, that's one --

MR. ALIOTO: I thought what the --

JUSTICE STEVENS: -- that's one of the ironic things about this aspect of the law. If they just made the agreement by themselves without forming the joint venture, it would be illegal per se, but if they restrain competition even more by forming a joint venture, then it's perfectly okay. But that's apparently what the law provides.

MR. ALIOTO: But -- but if the Court --

(Laughter.)

MR. ALIOTO: If it -- if it please the Court, if Equilon -- if Equilon were supposed to come up with a new -- with a new product itself -- I mean, the -- the -- your cases are so clear. BMI was allowed to fix the price because they came up with a product that nobody could do on their own, and that was one of the basic reasons. And even so, the people who made the agreement continued to compete against the -- the so-called product of the -- of the joint venture.

CHIEF JUSTICE ROBERTS: I don't understand that. I mean, now you're backing away from your concession. If you have a lawful joint venture that's marketing a product, the joint venture has to be able to set the price of the product.

MR. ALIOTO: Only if it is necessary to achieve the objectives of the joint venture.

CHIEF JUSTICE ROBERTS: No. No, if it's -- if it's a lawful joint venture and it's selling gasoline -- there's no retaining of prior brands -- the joint venture sets the price. And if the -- and all those people you said suffered when Equilon did this, those same number of people would have suffered if they're selling Equilon gasoline at a price determined by the joint venture. It seems to me a very artificial hook that you're trying to hang your case on, which is they retained for presumably legitimate brand competition reasons their separate brands, but that was the decision of the joint venture. And again, the joint venture has to be able to price its product whether it's sold as Equilon or whether it's sold as

Texaco or Shell under -- under the same -- same joint venture.

MR. ALIOTO: Mr. Chief Justice, I believe this Court has been consistently clear on this topic. You cannot even think about or touch price unless you have some specific, necessary connection to the joint venture.

JUSTICE BREYER: Really? Suppose we walk into a department store. In the department store, we see three perfume counters, and there are three salesmen, one behind each. Do they compete in price? The answer is obvious. Of course, not. Of course --

MR. ALIOTO: Three sales persons?

JUSTICE BREYER: Yes. Three counters. They sell perfume.

MR. ALIOTO: Yes.

JUSTICE BREYER: Of course, they don't compete. But do we know the department store has to be run that way? I mean, maybe some places it isn't. We can't prove it has to be run that way.

MR. ALIOTO: Well, this would be --

JUSTICE BREYER: Think of a -- think of a mall. Think of a bunch of shops. Maybe it doesn't. Maybe they could compete.

The reason that -- the law says they don't have to compete is because the law thinks in general it's a reasonable way to run a department store without forcing your sales people to compete. And similarly, a joint venture. You can't prove they have to have the price set at a central place, but the reason they set it at a central place, because it's a joint venture. And that's seems to me what the cases are consistent with. You tell me which one is it.

MR. ALIOTO: The danger -- the danger, Justice Breyer, is this. Is the Court going to say that two major competitors in a major industry, that if they get together from -- for some joint venture, whatever it is, that they're then allowed to fix the price?

JUSTICE BREYER: Oh, the answer is no. You're right.

JUSTICE SOUTER: But, Mr. Alioto, your argument, I think, is assuming that the facts in this case are like the facts in what I think I called my -- my crazy joint venture hypothetical in which the two principals agreed to a joint venture, but they accept in a clear and unequivocal way the pricing decisions.

And -- and it seems to me that the -- two things have come out of this argument.

Number one, you don't make that assumption, and that assumption is -- is not supported by the facts of this case.

And number two, Mr. Minear comes back and says as long as the division of profits under the joint venture agreement does not depend on these pricing decisions, they are not competitors, and therefore it's irrelevant anyway.

Doesn't your argument run against -- crash against one or the other or both of those answers?

MR. ALIOTO: I don't think so. The second one made by counsel for the Government runs directly against Citizens Publishing. That was in the case, Your Honor. And no one has suggested that Citizens Publishing be reversed.

And the second part is in fact they did that. They did act independently for at least 8 months.

JUSTICE SOUTER: Well, they did not change the price for at least 8 months.

MR. ALIOTO: No. In between, they didn't -- they didn't change the price. They didn't get involved in the price. Then they came up with their program and then they instructed the joint venture to make the prices the same.

JUSTICE SCALIA: Mr. Alioto --

MR. ALIOTO: Not the joint venture doing

that.

JUSTICE SCALIA: Who -- who is it that you would have had the price set by?

MR. ALIOTO: That would be --

JUSTICE SCALIA: I mean, it's their gas. Okay? They're marketing it through their stations. Who -- who would have set the price if -- if we said it's -- it's bad for Equilon to do it?

MR. ALIOTO: If they gave them independence and if there were some relationship with the joint venture --

JUSTICE SCALIA: Gave whom independence? Gave whom --

MR. ALIOTO: Gave Equilon and to Motiva. If they gave them independence to make their own judgment -- maybe Equilon would like to make Texaco a lower price. Maybe it like to make it a -- a discounter.

JUSTICE SCALIA: They did give them independence.

MR. ALIOTO: No.

JUSTICE SCALIA: That is --

MR. ALIOTO: Precisely did not.

JUSTICE SCALIA: They gave their board of directors independence. Now, the board of directors was composed, as -- as boards of directors of joint ventures are, by the parties to the joint ventures.

MR. ALIOTO: I'm not -- I'm not sure how it is in other situations. All I'm saying is when you have these two oil companies who are directing this and pretending that the decisions are being independent, that is not the fact in this case. And there's nothing wrong, Justice Souter, for two of these to read the way they did because they did it in our case.

JUSTICE SCALIA: Who -- have you answered my question? Who would you have wanted to set the price in this case?

MR. ALIOTO: Shell and Texaco should have done this. They should have said, okay, we're making Equilon for these -- for these cost savings. You, Equilon, can make the price decisions if you want to. Or they could say, you make the gasoline, give it to us, like GM and Toyota, and we will separately price it on our own.

JUSTICE SCALIA: But I think they did say the former. You -- you make the price decisions. Equilon.

MR. ALIOTO: They did not. Justice -- Justice Scalia, they did not.

JUSTICE SCALIA: Your -- your complaint is that Equilon is in reality a joint venture of -- of the two -- the two gasoline companies.

MR. ALIOTO: My complaint is --

JUSTICE SCALIA: That's your complaint.

MR. ALIOTO: My complaint is that two gasoline companies controlled the price that they were never able to fix before.

JUSTICE BREYER: If that were a real rule of reason argument, did you waive the rule of reason here?

MR. ALIOTO: I -- I waived the rule of reason argument with regard to showing market power and -- and impact on the market. I chose NCAA under the footnote -- and under footnote 39 of NCAA. And I chose price-fixing per se on the basis of Citizens Publishing.

JUSTICE GINSBURG: So is the answer -- in -- in case the Court does not agree with you, can you then say, I would like to resurrect rule of reason or do you agree with your adversary that -- that that's out of the case because you forfeited it?

MR. ALIOTO: If you do it, as was noted in California Medical, where you have this whole line from per se to the end on rule of reason, and in between on Misty Flats, no one is sure what they are, but we now know I am getting rid of the final one, the far one. But I am not -- I am not getting rid of -- and I -- and I do not waive the rule of reason based on the so-called quick look doctrine, as announced by this Court on a number of occasions. And we have satisfied all of those requirements. The restraint is on price directly.

JUSTICE GINSBURG: The ordinary, routine rule of reason you have waived. Is that so?

MR. ALIOTO: Yes, on impact of market.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Alioto.

MR. ALIOTO: If it please the Court, thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Nager, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF GLEN D. NAGER

ON BEHALF OF THE PETITIONERS

MR. NAGER: Thank you, Mr. Chief Justice. I have three quick points.

One, just to bring us back to the stipulated facts of this case, I'd ask the Court to check the joint appendix, page 78 to 79, stipulated fact number 62. The second sentence of that stipulation says, after the formation of Equilon and Motiva, the pricing was consolidated so that one person at Equilon set prices for both the Shell and Texaco brands in any given Equilon pricing area, and one person at Motiva set prices for both brands in any given Motiva pricing area.

There's never been any allegation in this case that Shell and Texaco set the actual prices at which this gasoline was sold at. The only claim then that the owners of the joint venture said that the prices had to be the same between the two branded names in any given area.

Secondly, with respect to the 8-month period that the respondents keep pointing to, the record reflects testimony that, as with any consolidation of two businesses that have been separate and are coming together, it took them a few months to figure out how to consolidate and unify and save the $800 million a year that was the purpose of this joint venture in consolidating. No -- no two companies, when they create a joint venture or merge, instantaneously are able to operate as if they didn't previously exist. It takes a while.

And the third point -- and this is the point that Justice Breyer has made. When this joint venture was created, it eliminated competition in the United States for branded gasoline between Shell and Texaco. That's a stipulated fact in this case. And when it eliminated competition between Shell and Texaco, there was no further competition to effect. There was no further anticompetitive consequence that could happen from the pricing of the gasoline of that joint venture. It's your three counters in the department store.

And if there is no further anticompetitive effect that can happen, there's no quick look reason possible, Justice Souter, for the issue that's been challenged in this case. Your hypothetical goes to the formation which they waived.

Thank you very much.

JUSTICE BREYER: Well, just as long as you have a minute --

(Laughter.)

JUSTICE BREYER: -- I take it that their point was, what you sort of said there, that -- that they had agreed -- sorry. Forget it.

(Laughter.)

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:17 a.m., the case in the above-entitled matter was submitted.)